

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

**2008 OAL DETERMINATION NO. 22
(OAL FILE # CTU 2008-0204-01)**

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REQUESTED BY: Thomas and Nancy Bollay

**CONCERNING: State Lands Commission Policy In Connection With
Development of Coastal Land Adjoining State-Owned
Tidelands**

**DETERMINATION ISSUED PURSUANT TO
GOVERNMENT CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a regulation, but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

FACTUAL BACKGROUND

On February 27, 2008, Thomas and Nancy Bollay (Petitioner) submitted a complete petition³ to OAL challenging as an underground regulation specific language from a

¹ Unless otherwise specified, all references are to the Government Code.

² As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

³ Petitioner's original petition, submitted on February 4, 2008, did not satisfy the requirements for a petition pursuant title 1, section 260 of the California Code of Regulations. Petitioner re-submitted a complete petition on February 27, 2008.

tideland study report (Study)⁴ issued by the State Lands Commission (Commission). The Study addressed tideland concerns in a specific area of Santa Barbara County consisting of eight beachfront parcels (Study Area).

The Commission prepared and issued the Study for the County of Santa Barbara Planning and Development Department (County) in response to the County's inquiry about the existence of state owned tideland in the Study Area. The County's inquiry was prompted by proposed development in the Study Area.

The Commission responded to the petition on June 6, 2008, and Petitioner submitted a rebuttal to the Commission's response on June 18, 2008. OAL received no public comments for this petition.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

CHALLENGED RULE

The petition alleges that the following language from the Study constitutes an underground regulation:

⁴ See Exhibit 9 to Petition. The full title of the Study is the *Santa Clause Lane Mean High Tide Line Study Report, Prepared for County of Santa Barbara Planning and Development* (issued by Staff of the California State Lands Commission; June, 2006). The Study is a 30-page report followed by 48 exhibits. Only the specific challenged language is relevant to this opinion.

Given that the known historical range of the mean high tide line in the Study Area extends nearly to the landward boundaries of the eight subject parcels, it seems unlikely that any of these parcels could be developed in a manner that . . . conformed to the *State Land Commission's policy that new development be sited landward of the most landward location of the mean high tide line.* (Study, p. 1, emphasis added.)

From this language, Petitioner alleges that the Commission has established and uses a “Most Landward Boundary Policy”⁵ to determine whether to object to proposed development, and that this policy is a regulation that has not been adopted pursuant to the APA. (Petition p. 1.)

ANALYSIS

The Commission is the state agency charged with exclusive jurisdiction over, and authority to administer and control, all tidelands owned by the state of California. (Public Resources Code section 6301.) The state owns all land below tide water, and below ordinary high water mark. (Civil Code sections 670 and 830.) The ordinary high water mark is the line of high water determined by the course of the tides over a long period of time. (*People v. William Kent Estate Co.* (1966) 242 C.A.2d 156, 159, 51 C.R. 215). Case law establishes that the statutory “ordinary high water mark” is referenced by the mean high tide line. (See, e.g., *Borax Consolidated, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 26 and *Lechuza Villas West v. California Coastal Commission* (*Lechuza Villas*) (1997) 60 Cal.App.4th 218, 239.) Thus, reference to the “ordinary high water mark” in the California codes means, as a matter of law, the mean high tide line. Land running seaward from the mean high tide line (i.e., from the mean high tide line into the ocean) is tideland and is generally owned by the state.

Although many issues were raised in the petition and responses, OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This determination determines (1) whether the challenged rule is a “regulation” within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

⁵ Petitioner describes this policy as the Commission’s “Most Landward Boundary Policy.” This is the Petitioner’s name for this policy, and to OAL’s knowledge, the Commission does not use this name for the policy. For purposes of this discussion, OAL will simply refer to the challenged rule as “policy.”

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁶

The first element of a regulation is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.

The rule challenged by the Petitioner is the Commission's stated policy that "development be sited landward of the most landward location of the mean high tide line." This policy appears applicable to all proposed development upland of the most landward location of the mean high tide line, irrespective of the Study Area, therefore it would apply to a clearly defined class of persons or situations. Accordingly, we conclude that the policy is a rule of general application and thus meets the first *Tidewater* element.

The second *Tidewater* element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. The Commission has exclusive authority over state tidelands, such as those in the Study Area. Public Resources Code section 6301 provides in pertinent part that the Commission:

has exclusive jurisdiction over all tidelands . . . owned by the State[, that all] jurisdiction and authority remaining in the State as to tidelands . . . is vested in the commission[, and that the] commission shall exclusively administer and control all such lands, and may lease or otherwise dispose of such lands, as provided by law, upon such terms and for such consideration, if any, as are determined by [the Commission].

In connection with its authority under Public Resources Code section 6301, the Commission has discretion to sue to eject any person who is trespassing on state-owned tideland and recover costs for ejectment,⁷ recover damages from any person trespassing on state-owned tidelands,⁸ remove or cause to be removed, any man-made structures or obstructions from tidelands,⁹ or may acquire, by gift, conveyance, or condemnation action, an easement over upland private lands for public access to tidelands.¹⁰ (The foregoing is not an exclusive list of the Commission's authority over state-owned tidelands.)

In adopting a policy relating to development of coastal land adjoining state-owned tidelands, the Commission is clearly exercising its authority to protect state-owned

⁶ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

⁷ Public Resources Code sections 6302.

⁸ *Id.*, sec. 6224.1

⁹ *Id.*, sec. 6216.1.

¹⁰ *Id.*, sec. 6210.9.

tidelands from trespass and encroachment.¹¹ Therefore the policy implements, interprets or makes specific the Commission's exclusive jurisdiction over, and authority to administer and control, all tidelands owned by the state of California. Accordingly, we conclude that the challenged rule meets the second *Tidewater* element and is, therefore, a regulation as defined in section 11342.600.

The final issue to examine is whether the challenged rule falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

Government Code section 11340.9(f) exempts from the APA "[a] regulation that embodies the only legally tenable interpretation of a provision of law." The California Supreme Court discussed the "only legally tenable interpretation" exception in *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 328, 132 P.3d 249. The court stated:

...the exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way" (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov. Code (2005 ed.) foll. § 11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a "well-supported" rationale for its view, it was not the only legally tenable interpretation of the pertinent statute].)

This "only legally tenable interpretation" exemption applies to a regulation that, although meeting the APA definition of a "regulation" in section 11342.600, represents the only interpretation that would allow the Commission to carry out its authority or duties under the law governing its activity, and that does not otherwise further interpret or supplement that law. Generally, the only legally tenable interpretation exemption cannot be applied where the law being interpreted authorizes the agency to employ discretion. Such discretion necessarily requires further interpretation or supplementation of the law, which is contrary to the only legally tenable interpretation exemption.

The exemption is not limited to interpretation of a single provision of law, but may be an interpretation derived from multiple legal provisions in statutes, cases, and duly adopted

¹¹ Commission response, p. 9 re-states this: "[A]ll lands lying below this line are held in trust by the state for the benefit of the people of the state, and any encroachment upon such lands is an unlawful trespass."

regulations that govern the Commission's activities, provided that the interpretation does not further interpret or supplement those laws.

As noted above, the state owns all tidelands from the ordinary high water mark into the ocean (Civil Code sections 670 and 830), and the Commission has exclusive jurisdiction over state-owned tidelands (Public Resources Code section 6301). The high water mark of the state-owned tidelands "necessarily moves, and thus the mark or line of mean high tide, i.e., the legal boundary, also moves." (*Lechuza Villas*, p. 243). Thus, while the boundary line of state-owned tidelands lies seaward of the mean high tide line, *that boundary line may vary*, and the Commission's authority necessarily includes the protection of any foreseeable interest in state-owned tidelands resulting from changes in the boundary line. In stating its policy that new development be sited landward of the most landward location of the mean high tide line, the Commission is recognizing the most landward point at which state ownership is known to end. Any development seaward of that line has the potential to compromise the state's ownership interest in tidelands and would be inconsistent with the public trust.

Accordingly, we conclude that the Commission's policy that new development be sited landward of the most landward location of the mean high tide line, although it meets the definition of a "regulation," is exempt from the APA because it constitutes the only legally tenable interpretation of applicable law.

CONCLUSION

In accordance with the above analysis, OAL determines that the challenged policy is a "regulation" as defined in section 11342.600, but is exempt from the APA under the "only legally tenable interpretation" exemption in section 11340.9(f) and, therefore, is not required to be adopted pursuant to the APA.

Accordingly, OAL determines that the challenged language is not an underground regulation.

August 26, 2008



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